In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 939

CARLOS M. AULET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted by a jury, in the United States District Court for the Northern District of Illinois, of knowingly receiving and concealing unlawfully imported heroin in violation of 21 U.S.C. 174. He was sentenced to imprisonment for five years (R. 67).* The court of appeals affirmed the conviction on December 23, 1964 (Pet. App. 1a-5a). A petition for rehearing was denied on January 22, 1965. The petition

* "R." refers to the appendix filed in the court below.

for a writ of certiorari was not filed until February 26, 1965, and is therefore out of time under Rule 22-2 of the Rules of this Court. In any event, the issues raised by the petition do not merit review by this Court.

1. There is no basis for petitioner's contention that the evidence established entrapment as a matter of law. The testimony on the issue was conflicting. Petitioner testified that he was induced, through sympathy, to purchase narcotics for the special employee, Rosas, because, during their conversation outside a tavern, Rosas had exhibited withdrawal symptoms—red eyes, scratching of his back and legs, and bending over with his hands on his stomach as if to vomit (R. 26-27, 29-30). An agent who had observed the entire conversation through the tavern window testified that just before petitioner and Rosas had gone outside he had observed that Rosas' eyes were not bloodshot, and that during the discussion on the sidewalk Rosas did not scratch, hold his stomach, bend over as if to vomit, or demonstrate any other symptoms of narcotics addiction (R. 43). Moreover, the version of the facts offered by petitioner was discredited by the disclosure of his other recent dealings in narcotics (R. 44-45). The issue plainly involved a question of credibility and was properly submitted to the jury. *Masciale* v. *United States*, 356 U.S. 386, 388; *Sherman* v. *United States*, 356 U.S. 369, 377.

2. Petitioner has no ground to complain of the instructions under which the defense of entrapment was submitted. As noted by the court below (Pet.

App. 4a), the instruction is in accord with applicable decisions of this Court and contains no misstatement of law. Petitioner's general challenges to its appropriateness and accuracy (Pet. 15) are unsupported by any fair reading (Pet. App. 11a-12a; R. 53-55). Moreover, this particular instruction was given by the trial court at the specific request of petitioner, and he cannot now be heard to complain of his own choice of words.**

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1965

** The allegedly improper propositions of law concerning the defense of entrapment, which petitioner purports to read into the decision of the court of appeals and which petitioner invites this Court to examine in a general review of the law in this area (Pet. 11-14), do not in fact appear in the opinion.

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